INTERSTATE COMMERCE IN INTOXICATING LIQUORS BEFORE THE WEBB-KENYON ACT.

ONE of the most important, as well as one of the most difficult, problems in the disputed zone between the police power of the commonwealths of the United States and congressional authority over interstate commerce, is as to the validity of legislation which attempts to restrict the importation into a state of shipments of intoxicating liquors. Obviously, state regulations concerning the sale—and recent enactments aim avowedly at the use—of intoxicants may well be made nugatory if federal protection attaches through the channels of interstate commerce. Congress, while not desiring itself to assume control of the subject, has several times passed legislation designed to remove this bar to the enforcement of state regulations.[1] The two most important statutes are the Wilson Act (1890) and the Webb-Kenyon Act (1913),[2] the latter being resorted to because the former had failed to accomplish the anticipated purpose.

In previous papers,[3] I have made somewhat extended comment on the Webb-Kenyon Act and there have since been no adjudications of any importance. The Supreme Court of the United States, in its only decision on the subject,[4] was not called upon to interpret and apply the federal statute. Cases,[5] however, in

---

[1] See for this general question of the conflict of authority the excellent article of former United States Attorney-General Wickersham on "Confused Sovereignty," 11 ILL. LAW REV. 225 (Nov., 1916).

[2] Act of August 8, 1890, 26 Stat. L. 313; Act of March 1, 1913, 37 Stat. L. 699.

[3] "The Constitutionality of the Webb-Kenyon Bill," 1 CAL. LAW REV. 499 (Sept., 1913); "State Legislation under the Webb-Kenyon Act," 27 HARV. LAW REV. 225 (Jan., 1915); "Unlawful Possession of Intoxicating Liquors and the Webb-Kenyon Act," 16 COL. LAW REV. 1 (Jan., 1916); and "The Virginia Prohibition Law and the Commerce Clause of the Federal Constitution," 3 VA. LAW REV. 483 (April, 1916).

[4] Adams Express Co. *v.* Kentucky, 238 U. S. 190 (1915).

[5] James Clark Distilling Co. *v.* Western Md. Ry. Co. and State of West Virginia; James Clark Distilling Co. *v.* American Express Co. and State of West Virginia. Nos. 75 and 76, October Term, 1916.

which a holding as to the meaning and scope of the Webb-Kenyon Act is inevitable have been argued three times, and in the near future the Supreme Court will doubtless make a definite pronouncement. Further discussion of the Act itself and state laws under it may, therefore, appropriately wait upon the Supreme Court's decision. In the meantime, it may be well to examine more closely than previous papers have done the origin and development of the conflict between state and congressional authority prior to 1913, for it is only by a correct understanding of the questions thus raised that the nature and object of the federal statutes can be rightly understood; and the whole problem is one of great importance.

I. Before the Wilson Act (1890).

Judicial construction of the commerce clause of the federal constitution began in 1824 with the great case of Gibbons *v.* Ogden.[6] The incisiveness and power of Marshall's opinion often obscure the exact nature of the point decided, namely, that privileges secured under the Act of Congress of February 18, 1793, for licensing vessels to be employed in the coasting trade could be successfully asserted against a monopoly which the state of New York attempted to grant; and the state law was declared unconstitutional as encroaching upon the federal authority to regulate interstate commerce.

It would be impossible in this paper to consider the many phases of this remarkable opinion even were there not an abundance of literature on the subject.[7] It has been well said that, "the doctrine of the Court, if accepted literally, is surprising in the extent of the power claimed for the Federal Government," [8] but the same able commentator remarks that the decision simply "establishes that navigation is within the commercial powers of Congress, and that a Federal coasting license is a sufficient authority to navigate the public waters of a state." [9]

---

[6] 9 Wheat. 1 (1824).

[7] See Prentice, Fed. Power over Corps. and Carriers, Chap. III.

[8] *Ibid.*, p. 73.

[9] *Ibid.*, p. 76. Mr. Prentice adds that "Marshall could in 1824 safely frame his definition of commerce in the broadest terms, because com-

Chief Justice Marshall declared, in words frequently quoted:[10]

> "The power over commerce with foreign nations, and among the several States, is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States. The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments."

And, answering the argument that both the states and the federal government could levy taxes and that both could regulate interstate commerce, Marshall denied the analogy and asserted the exclusiveness of the congressional authority which was competent, he declared, to impose regulations on the states even in those subjects—quarantine, for example—which were then subject to local control.

The cases following Gibbons *v.* Ogden, however, indicate that the Supreme Court of the United States has by no means adopted, without very important qualifications, Marshall's view as to the exclusiveness of the federal authority. In theory, of course, the doctrine has been maintained that the states could not enact any measures which regulated interstate commerce; but the Supreme Court has sanctioned interferences which applied very materially to commerce, and has occasionally been driven to reasoning which, while ingenious, is not conclusive in that it fails to lay down any consistent principles upon which the validity of a state law may be tested. And, in fact, it was for a time the reasonable inference, drawn from Marshall's own language, as well as from the decisions of the court, that the test was to be found not in the exclusiveness of federal authority and the materiality

merce itself was a narrow operation. When easier means of intercourse brought the states closer together, even judges who sat on the bench with Marshall differed under the new conditions, as to the meaning of the language in this case." (The License Cases, Gilman *v.* Philadelphia, etc., *infra.*)

[10] Gibbons *v.* Ogden, 9 Wheat. 1, 197.

with which the local law applied to interstate commerce, but rather in the existence of a congressional statute covering the same subject. This was partially indicated by the second case which the Supreme Court decided.

The Maryland legislature attempted to require all importers of foreign made goods, and all wholesalers of articles coming into the state, to pay a license fee of fifty dollars. The act was attacked on the grounds that it was repugnant to the clause of the Constitution which prevents the state from levying without the consent of Congress, imposts in excess of those "absolutely necessary for executing its inspection laws," and to the commerce clause. The act was declared unconstitutional on both these grounds.[11]

Chief Justice Marshall said:

> "If this [the commerce] power reaches the interior of a State, [the Court in Gibbons *v.* Ogden having declared that the power could not be stopped at state boundary lines] and may be there exercised, it must be capable of authorizing the sale of those articles which it introduces. Commerce is intercourse: one of its most ordinary ingredients is traffic. It is inconceivable that the power to authorize this traffic, when given in the most comprehensive terms, with the intent that its efficacy should be complete, should cease at the point when its continuance is indispensable to its value. To what purpose should the power to allow importation be given, unaccompanied with the power to authorize a sale of the thing imported? Sale is the object of importation, and it is an essential ingredient of that intercourse, of which importation constitutes a part. It is as essential an ingredient, as indispensable to the existence of the entire thing, then, as importation itself. It must be considered as a component part of the power to regulate commerce. *Congress has a right, not only to authorize importation, but to authorize the importer to sell.*" [12]

---

[11] Brown *v.* Maryland, 12 Wheat. 419 (1827).

[12] Pp. 446, 447. The italics are mine. "This argument" (considered with reference to the invalidity of the measure as a tax law), remarked Mr. Justice Daniel in The License Cases, 5 How. 504, 616 (1847), "involves the palpable absurdity, that merchandise which the government does not so strongly favor as to admit without duty shall remain intact and sacred, whilst merchandise which is so much preferred as to be

The Chief Justice went on to point out that any penalty inflicted on the importer for selling the article in his capacity of importer must be in conflict with the congressional statute authorizing importation: [13]

> "Any charge on the introduction and incorporation of the articles into and with the mass of property in the country, must be hostile to the power given to Congress to regulate commerce, since an essential part of that regulation, and principal object of it, is to prescribe the regular means for accomplishing that introduction and incorporation."

In a purely *obiter* sentence, Marshall added: [14]

> "That we suppose the principles laid down in this case, to apply equally to importations from a sister State."

While in this case also, much of the language indicates that the repugnancy of the state statute was to the commerce clause—and the assertion of a right of sale in the "original package" as intimately connected with the right of importation bears out this interpretation—the Maryland law taxed imports and there was an act of Congress regulating the same subject. That a federal statute might be necessary to check state action was clearly indicated by the next case [15] in which the court held valid a state law which authorized the construction of a dam across a navigable stream. It was urged that the law conflicted with the federal commerce power, but Marshall answered: [16]

"If Congress had passed any act which bore upon the case;

---

admitted freely—nay, whose introduction is in effect invited and solicited by the federal government—may be burdened by the States at pleasure." But this criticism rested upon the incorrect "proposition that by payment of the federal tax the importer purchased the right to sell free from state interference." See PRENTICE, FED. POWER OVER CORPS. AND CARRIERS, p. 184.

[13] *Ibid.*, p. 448. Mr. Prentice points out that while it is frequently said that the "original package" principle was first announced in this case, it may be traced to state statutes adopted under the Articles of Confederation. PRENTICE, FED. POWER OVER CORPS. AND CARRIERS, p. 101; FREUND, POLICE POWER, § 81.

[14] *Ibid.*, p. 449.

[15] Willson *v.* The Black Bird Creek Marsh Co., 2 Pet. 245 (1829).

[16] *Ibid.*, p. 252. See Mr. Justice McLean's comment in The Passenger Cases, 7 How. 283, 398 (1849).

> any act in execution of the power to regulate commerce, the object of which was to control state legislation over those small navigable creeks into which the tide flows, and which abound throughout the lower country of the middle and southern states; we should feel not much difficulty in saying that a state law coming in conflict with such an act would be void. But Congress has passed no such act. The repugnancy of the law of Delaware to the Constitution is placed entirely on its repugnancy to the power to regulate commerce with foreign nations and among the several states; a power which has not been so exercised as to affect the question."

It was held, therefore, that the state regulation could not "be considered as repugnant to the power to regulate commerce in its dormant state, or as being in conflict with any law passed on the subject."

Now, while this opinion has been interpreted as marking a departure from the views announced in Gibbons *v.* Ogden and Brown *v.* Maryland,[17] the brevity of Marshall's statement makes it extremely unlikely that he considered the decision as not in consonance with the former adjudications. Here, it should be pointed out, there was no law of Congress, but apart from this consideration it is possible to interpret the case as foreshadowing "the present rule that the federal power is exclusive in matters of general interest, while in local matters the states may legislate until their action is superseded by Congress." [18]

One other case [19] decided before the Supreme Court of the United States first passed upon the question of intoxicating liquors in interstate commerce may be dismissed very briefly. A statute of New York requiring the master of every arriving vessel to report his passengers to the state authorities was held valid, as a measure of police and not a regulation of commerce; and

---

[17] See 2 WILLOUGHBY, CONSTITUTION; COTTON, CONSTITUTIONAL DECISIONS OF JOHN MARSHALL, p. xxxiv.

[18] PRENTICE, FED. POWER OVER CORPS. AND CARRIERS, p. 106, and the citations from subsequent opinions of the Supreme Court as to the meaning of this case.

[19] New York *v.* Miln, 11 Pet. 102 (1837). When this case was decided the personnel of the Supreme Court was very largely changed, Taney being Chief Justice. See THAYER, CAS. CONST. LAW, 1840.

there was no collision between the state law and the acts of Congress. The Court said: [20]

> "We think it as competent and as necessary for a state to provide precautionary measures against the moral pestilence of paupers, vagabonds, and possibly convicts; as it is to guard against the physical pestilence which may arise from unsound and infectious articles imported, or from a ship, the crew of which may be labouring under an infectious disease."

This case did not serve to change the varying conclusions which it seems might be properly drawn from the adjudications of the Supreme Court up to this time.

The question of intoxicating liquors in interstate commerce first came before the Supreme Court of the United States in 1847, three cases arising under the laws of Massachusetts, Rhode Island and New Hampshire, which were passed at that period when the New England states were without any very consistent policy towards the sale of liquors.[21] The Supreme Court held [22] that all three laws were not inconsistent with the commerce clause or legislation under it; but the result, concurred in unanimously, is the only definite thing about the case, for six of the justices handed down nine separate opinions which show that the validity of the local regulations was upheld on varying theories, such as concurrent jurisdiction over commerce or the supremacy of the police power. This is to be regretted, for if there had been a flat-footed declaration, concurred in by a fair majority of the judges, on the tremendously important question as to the power of a state with respect to importations of liquor, subsequent de-

[20] P. 142. In Groves *v.* Slaughter, 15 Pet. 449 (1841), the Supreme Court said that a provision of the Mississippi constitution prohibiting the introduction into the state of slaves simply operated as a direction to the legislature, and since no statute was passed, the court did not have to determine the scope of state power. But it seems that a majority of the justices *obiter* thought that the state had authority to make the exclusion. Cf. Art. I, § 9, Clause 1 of the Federal Constitution.

[21] See the article on "Prohibition," 3 LALOR, CYC. POL. SC. 378.

[22] The License Cases (*sub nom.*, Thurlow *v.* Massachusetts, Fletcher *v.* Rhode Island, and Peirce *v.* New Hampshire), 5 How. 504 (1847). "It is remarkable, however," Professor Willoughby comments, "that no dissenting opinion was filed in advocacy of the exclusive power of the Federal Government." 2 WILLOUGHBY, CONST., 656.

cisions might have been different, and Congress would not have been forced to intervene to extend the scope of local authority.

The only one of these cases which directly raised the question of the extent of state authority over a commodity brought in *from another state,* was Peirce *v.* New Hampshire. By the first section of the New Hampshire law, approved July 4, 1838, it was provided "that if any person shall, without license from the selectmen of the town, etc., sell any wine, rum, gin, brandy, or other spirits, in any quantity, etc., such person shall pay a sum not exceeding fifty dollars, etc." The defendants were charged with having sold, without a license, one barrel of gin, which had been purchased in Boston, taken to the defendants' store in Dover (N. H.), and later sold in the same barrel.

It is interesting to note—and Chief Justice Taney in his opinion refers to it [23]—that he was of counsel for the state of Maryland when Brown *v.* Maryland was argued. At the time Taney considered the state law valid, and "thought the decision of the court restricted the powers of the State more than a sound construction of the constitution of the United States would warrant. But further and more mature reflection has convinced me that the rule laid down by the Supreme Court is a just and safe one, and perhaps the best that could have been adopted for preserving the right of the United States on the one hand, and of the States on the other, and preventing collision between them." So, accepting the doctrine of Brown *v.* Maryland, the Chief Justice proceeded to differentiate it from the case at the bar.

Chief Justice Taney's opinion considered the three cases together. He first laid down two principles: (1) that the Constitution and acts of Congress in pursuance thereof being the supreme law of the land, if a state law is in conflict with an act of Congress, it ceases "to operate so far as it is repugnant to the law of the United States;" and (2) that the power of Congress extends no further than the *regulation* of commerce, whether interstate or foreign, and "that beyond these limits the states have never surrendered their power over trade and commerce and may still exercise it, free from any controlling power on the part of the general government. Every state, therefore,

[23] The License Cases, 5 How. 504, 575.

may regulate its own internal traffic, according to its judgment and upon its own views of the interest and well being of its citizens." These principles, he said, had never been questioned, and difficulties arose simply from their applications.

In the New Hampshire case, Taney said that, according to the doctrine of Brown *v.* Maryland, the cask of gin was subject to the legislation of Congress, but the controlling difference was that in Brown *v.* Maryland Congress had regulated commerce with foreign nations, whereas Congress had not exercised its power on commerce between the states. And the law in question differed, he said, from those of Massachusetts and Rhode Island, for these "operated upon the articles after they had passed beyond the limits of foreign commerce, and consequently were beyond the control and power of Congress." [24] The New Hampshire law, however, "acts directly upon an import from one state to another, while in the hands of the importer for sale, and is therefore a regulation of commerce, acting upon the article while it is within the admitted jurisdiction of the general government, and subject to its control and regulation." The question was then, whether the grant to Congress was itself a prohibition to the states, and whether *ex proprio vigore* the commerce clause made null and void all state laws on the subject. It was impossible, Taney asserted, to decide the case on any other ground, if acceptance was given to the line of division marked out by the Supreme Court in Brown *v.* Maryland.

To Taney it was clear "that the mere grant of power to the general government alone cannot, upon any just principles of construction, be construed to be an absolute prohibition to the exercise of any power over the same subject by the states." And although the supreme authority is possessed by Congress, "in

[24] The laws of Massachusetts and Rhode Island prohibited the sale (without license) of spirits in less than specified quantities which were not the ones enumerated by the acts of Congress on the subject. These cases could be distinguished from Brown *v.* Maryland, *supra,* on the ground that the original importers were not indicted for violation of the laws, and there was no question of the "original package"—a distinction which the Supreme Court of the United States had first hinted at in Brown *v.* Maryland. (Thurlow *v.* Massachusetts and Fletcher *v.* Rhode Island.) But see *supra,* footnote 13.

my judgment, the state may, nevertheless, for the safety or convenience of trade, or for the protection of the health of its citizens, make regulations of commerce for its own ports and harbours and for its own territory; and such regulations are valid unless they come in conflict with a law of Congress." The language of the constitutional grant, Taney pointed out, furnished no warrant for reaching a different conclusion; and further, in many instances after a grant has been made to Congress, the Constitution proceeds to prohibit in express terms the exercise by the state of similar power. If the intention of the framers was to prevent legislation like that of New Hampshire, it is difficult, Taney said, "to account for the omission to prohibit it. * * * if the mere grant of power to the general government was in itself a prohibition to the states, there would seem to be no necessity for providing for the supremacy of the laws of Congress, as all state laws on the subject would be *ipso facto* void"

This conclusion, Taney argued, was justified by the fact that, while pilotage, health and quarantine laws were universally admitted to be proper subjects for regulation by Congress under its commerce power, they had always been controlled by the states, as fully since the adoption of the Constitution as they had been before. And he continued:[25]

> "Now, so far as these laws interfere with shipping, navigation, or foreign commerce, or impose burdens upon either of them, they are unquestionably regulations of commerce. Yet, as I have already said, the power has been continually exercised by the States, has been continually recognized by Congress ever since the adoption of the constitution, and constantly affirmed and supported by this court whenever the subject came before it."

Taney's opinion makes out a tolerably convincing case that previous decisions of the Supreme Court did not necessarily negative the result which was reached in The License Cases. There are, he readily admitted, *dicta* in Gibbons *v.* Ogden which support a contrary view, but it had been there decided, he thought, "that a State may, in the execution of its powers of

[25] The License Cases, 5 How. 504, 581.

internal police, make regulations of foreign commerce; and that such regulations are valid unless they come into collision with a law of Congress." Marshall conceded, he said, that the states had power to regulate pilotage, quarantine and health, provided there is no conflict with the law of Congress, for the controlling power is in the general government. Furthermore, Taney considered the case of Willson *v.* The Black Bird Creek Marsh Co. as controlling, for in his decision Marshall declared that the Delaware law could not be considered as repugnant to the commercial power of Congress in its "dormant state." Finally, Taney urged, powers possessed by the federal government did not prevent the states from legislating on the militia [26] and bankruptcy.[27]

The principle which guided Taney in holding the New Hampshire law constitutional, therefore, was that while Congress had the power to regulate imports of intoxicating liquor into a state —and the fair implication from the Chief Justice's opinion is that this included the power to compel their admission by a state against its will—nevertheless, in the absence of any congressional regulation, it was no bar to the operation of the police power if in effect interstate commerce was controlled by the requirements of a license before sale, even in the original package, could take place.

But Mr. Justice Catron, in his opinion in Peirce *v.* New Hampshire, argued a slightly different theory. Taney's argument, he maintained, subjected the commercial power of Congress to a very material limitation, and the validity of the law could not be made to depend upon "the reserved power in the State to regulate its own police;" the correct principle was that of a concurrent power over commerce; "that the power to regulate commerce among the States may be exercised by Congress at pleasure, and the States cut off from regulating the same commerce at the same time it stands regulated by Congress; but that, until such regulation is made by Congress, the States may exercise the power within their respective limits." Thus, since there

[26] Houston *v.* Moore, 5 Wheat. 1 (1820).
[27] Sturges *v.* Crowinshield, 4 Wheat. 122 (1819).

was no regulation of Congress on this particular subject, the New Hampshire law was valid.[28]

Mr. Justice McLean's opinion [29] was that "if the State power be necessary to the preservation of the morals, health, or safety of the community, it must be maintained," and Mr. Justice Grier "concurred mainly" with him. The exclusive power of Congress was not necessarily involved; "police laws for the preservation of health, prevention of crime, and protection of the public welfare, must, of necessity, have full and free operation, according to the exigency which requires their interference." [30] Mr. Justice Woodbury's concurring opinion was of more significance in that it later found acceptance by the Supreme Court: [31]

> "There is nothing in its [the commerce clause] nature, in several respects, to render it more exclusive than the other grants, but, on the contrary, much in its nature to permit and require the concurrent and auxiliary action of the States. * * * There is much in connection with foreign commerce that is local within each State, convenient for its regulation and useful to the public, to be acted on by each until the power is abused or some course is taken by Congress conflicting with it. * * *
>
> "This local, territorial, and detailed legislation should vary in different States, and is better understood by each than by the general government; * * * the States not conflicting with any uniform and general regulations by Congress as to foreign commerce, must for convenience, if not necessity, from the very nature of the power, not be debarred from any legislation of a local and detailed character on matters connected with that commerce omitted by Congress."

The result of The License Cases was, therefore, simply to hold the New Hampshire regulation constitutional. As the quotations from the different opinions make clear, the justices disagreed on the principles by which the conclusion was reached.[32]

---

[28] The License Cases, 5 How. 504, 601, 608.

[29] *Ibid.*, p. 592.

[30] *Ibid.*, p. 632.

[31] *Ibid.*, pp. 624, 625.

[32] See the later statements of the Chief Justice and Mr. Justice Woodbury that a majority of the Court in The License Cases thought that the power of Congress was not exclusive. The Passenger Cases, 7 How. 283, 470, 559 (1848).

Taney thought that Congress had the power to regulate the importation but since no action had been taken, the state could pursue the policy which it considered the public interest to demand. Justices Catron and Nelson on the whole agreed with this—that the New Hampshire law was really a regulation of commerce, valid during congressional silence. That the power of Congress ended with the importation was the thesis upheld by Mr. Justice McClean, and the sale after importation was exclusively within the province of the state. So also, Mr. Justice Daniel flatly denied that the right of importation included the right to sell, and while Congress had exclusive authority to regulate the former, the authority of the state to regulate the latter was equally exclusive. Almost to the same effect was the opinion of Mr. Justice Woodbury, but he argued more strongly that there was concurrent jurisdiction. The other justices contributed no novel views to the discussion.[33]

The Passenger Cases,[34] decided the next year, did not solve the disputed questions; but this lack of any definite rule upon which to authorize state action in particular cases and deny it in others was done away with in 1851, when the Supreme Court decided in Cooley *v.* Port Wardens[35] that a pilotage law of Pennsylvania was valid on the ground that, while it did constitute a regulation of interstate commerce, it related only to a matter which properly lent itself to state control, in which, even, diversity was preferable to uniformity, and on which Congress had not legislated. This theory, which sanctioned a concurrent jurisdiction on questions of local concern, had first been suggested by Webster as counsel in Gibbons *v.* Ogden, formed the basis of Mr. Justice Woodbury's concurring opinion in The License Cases and of his dissenting opinion in The Passenger Cases, was adopted by Mr. Justice Curtis in Cooley *v.* Port Wardens,

[33] For an interpretation of The License Cases see Bowman *v.* Chicago Ry. Co., 125 U. S. 465, 477 (1888); and the able analysis by Mr. Justice Gray in his dissenting opinion, Leisy *v.* Hardin, 135 U. S. 100, 135-147 (1890).

[34] (*Sub nom.*, Smith *v.* Turner and Norris *v.* Boston), 7 How. 283 (1849).

[35] 12 How. 299 (1851).

and has become the settled rule.[36] It has the merit of being both simple and logical, but the difficulty is that it fails, and the Supreme Court has not supplied the deficiency, in providing the necessary *criteria* for distinguishing what are matters of local interest and what matters where a uniform rule is desirable. Furthermore, the states have a certain amount of authority under their powers of police. The distinction seems to be that as to matters of local concern the states have concurrent authority and their regulations may bear directly on interstate commerce; as to matters of police the regulations must be incidental and indirect.[37]

The first of the two late cases [38] that led to action by Congress was Bowman *v.* Chicago, etc., Ry. Co.[39] A statute of Iowa attempted to require before a common carrier might bring in intoxicating liquor, a certificate, under the seal of the auditor of the county into which the liquor was to be transported, certifying that the consignee had the right to sell the liquors. Here was presented a question which had not arisen in The License Cases, namely, whether the state had a right, in the absence of congressional action, to forbid importation.

---

[36] See 2 WILLOUGHBY, CONST. 657; PRENTICE, FED. POWER OVER CORPS. AND CARRIERS, 115; 1 WOOLEN AND THORNTON, INTOXICATING LIQUORS, 703-704.

[37] 2 WILLOUGHBY, CONST. 662, where the distinction is criticised as unnecessary and confusing.

[38] Mention should be made here of the case of Walling *v.* Michigan, 116 U. S. 446 (1886). The Supreme Court of the United States held unconstitutional a law of Michigan imposing a tax on persons who did not have their principal place of business in the state, but who engaged in selling, or soliciting the sale of, certain liquors that were to be shipped into the state. The Court held this "a discriminating tax levelled against persons for selling goods brought into the State from other states or countries." It had been repeatedly held, said the Court, that the commercial power of Congress "is exclusive in matters which require, or only admit of, general and uniform rules, and especially as regards any impediment of or restriction upon such commerce," and that "so long as Congress does not pass any law to regulate commerce among the several States, it thereby indicates its will that such commerce shall be free and untrammeled; and that any regulation of the subject by the States, except in matters of local concern only, is repugnant to such freedom." (p. 455).

[39] 125 U. S. 465 (1888). The other case was Leisy *v.* Hardin, 135 U. S. 100 (1890).

The opinion of the Supreme Court was written by Mr. Justice Matthews who, after showing the inapplicability of The License Cases, referred to the fact that Congress had legislated on the subject of the transportation of passengers and merchandise,[40] and had excepted this legislation from preventing local regulation or prohibition of the transportation of nitroglycerine and other explosive substances. "So far as these regulations made by Congress extend," said the Court, "they are certainly indications of its intention that the transportation of commodities between the States shall be free, except where it is positively restricted by Congress itself, *or by the States in particular cases by the express permission of Congress.*" [41]

The opinion relies very largely on County of Mobile *v.* Kimball,[42] where the idea of Cooley *v.* Port Wardens [43] was clearly restated, that some matters, subject to regulation by Congress under its commerce power, were national in character, while some were local, requiring different plans or modes of treatment.

> "Of the former class may be mentioned all that portion of commerce with foreign countries or between the States which consists in the transportation, purchase, sale, and exchange of commodities. Here there can of necessity be only one system or plan of regulations, and that Congress alone can prescribe. Its non-action in such cases with respect to any particular commodity or mode of transportation is a declaration of its purpose that the commerce in that commodity or by that means of transportation shall be free. There would otherwise be no security against conflicting regulations of different States, each discriminating in favor of its own products and citizens, and against the products and citizens of other States. And it is a matter of public history that the object of vesting in Congress the power to regulate commerce with foreign nations and among the States was to insure uniformity of regulation against conflicting and discriminating State legislation." [44]

And in the case to be decided, the carrier was being sued for

---

[40] R. S., §§ 4278, 4279.

[41] Bowman *v.* Chicago, etc., Ry. Co., 125 U. S. 465, 485. (Italics are mine.)

[42] 102 U. S. 691 (1880). [43] *Supra.*

[44] County of Mobile *v.* Kimball, 102 U. S. 691, 698.

an alleged breach of duty under the Illinois law, in that it refused to accept and transport goods which as a common carrier it was bound to receive and carry. The Iowa law, forbidding importation of liquor without the certificate, was set up as a defense; and was there any more reason to hold, asked the Court, that the Iowa law had a greater extra-territorial force than the Illinois one? They came into conflict; and which should prevail?

The Court readily admitted that pestilential substances could be denied entrance into a state, and that inspection and quarantine regulations were valid. But the Iowa statute was neither and "although its motive and purpose are to perfect the policy of the State of Iowa in protecting its citizens against the evils of intemperance, it is none the less on that account a regulation of commerce." [45] The Court considered it, furthermore: [46]

> "An attempt to exert that jurisdiction [of the state] over persons and property within the limits of other States. It seeks to prohibit and stop their passage and importation into its own limits, and is designed as a regulation for the conduct of commerce before the merchandise is brought to its border. It is not one of those local regulations designed to aid and facilitate commerce; it is not an inspection law to secure the due equality and measure of a commodity; it is not a law to regulate or restrict the sale of an article deemed injurious to the health and morals of the community; it is not a regulation confined to the purely internal and domestic commerce of the State; it is not a restriction which only operates upon property after it has become mingled with and forms part of the mass of the property within the State. It is, on the other hand, a regulation directly affecting interstate commerce in an essential and vital point. If authorized, in the present instance, upon the grounds and motives of the policy which have dictated it, the same reason could justify any and every other state regulation of interstate commerce upon any grounds and reasons which might prompt in particular cases their adoption. It is, therefore, a regulation of that character which constitutes an unauthorized interference with the power given to Congress over the subject. If not in contravention of any positive legislation by Congress, it is nevertheless a breach and

[45] Bowman *v.* Chicago, etc., Ry. Co., 125 U. S. 465, 493.
[46] *Ibid.*, p. 498.

> interruption of that liberty of trade which Congress ordains as the national policy, by willing that it shall be free from restrictive regulations."

As to the right of importation necessarily including the right to sell in unbroken packages, the Supreme Court refused to express an opinion because the question did not arise in the case at bar.

To this decision there was a vigorous dissent by Mr Justice Harlan, with whom concurred the Chief Justice (Waite) and Mr. Justice Gray.[47] The strong opinion in Mugler *v.* Kansas[48] —written by Mr. Justice Harlan himself—was quoted as asserting "the acknowledged right of the states of the Union to control their purely internal affairs, and, in so doing, to protect the health, morals, and safety of their people by regulations that do not interfere with the execution of the powers of the general government, or violate rights secured by the Constitution;" and after referring to the danger to the public morals, health, and safety of the unrestricted use of intoxicants, declared that it was not for the courts to disregard the legislative determination of the subject.

Mr. Justice Harlan cited a number of previous adjudications of the Supreme Court which he said were impaired by the majority doctrine. In The Passenger Cases,[49] the Court had declared that "a state, in the exercise of its police power, may forbid spirituous liquors, imported from abroad or from another state, to be sold by retail or to be sold at all without a license; and it may visit the violation of the prohibition with such punishment as it may deem proper." The Supreme Court had, furthermore, declared that in conferring upon Congress the power to regulate interstate commerce, the Constitution was "never intended to cut the states off from legislating on all subjects relating to the health, life, and safety of their citizens, although the legislation might indirectly affect the commerce of the country." In Railroad Co. *v.* Husen,[50] the court had invalidated a statute of Missouri on the ground that it did not distinguish between diseased and healthy cattle in prohibiting the introduction into

---

[47] *Ibid.*, p. 509.

[48] 123 U. S. 623 (1887). [49] *Supra.*

[50] 95 U. S. 465 (1877). See also, Sherlock *v.* Alling, 93 U. S. 99 (1876).

Missouri of all Texas, Mexican, or Indian cattle between May and November; but it was declared that the states had not surrendered their police power and if the law had made the necessary distinction it would have been valid.[51]

If, Mr. Justice Harlan argued further, the Constitution conferred the right to transport and the right to sell in unbroken packages, then the state laws against sale would be useless, for a citizen of Iowa need only have the liquors delivered to him from without the state in packages of sizes to suit the customers. Or he could have his warehouse across the state line and himself transport the liquors in the original packages.[52] "Thus the mere silence of Congress upon the subject of trade among the states in intoxicating liquors is made to operate as a license to persons doing business in one state to jeopardize the health, morals, and good order of another state, by flooding the latter with intoxicating liquors, against the express will of her people." On the contrary, the Iowa statute was just as much a valid police measure (and only incidentally a regulation of interstate commerce) as were laws prohibiting the introduction of rags or goods infected with disease, or provisions unfit for human consumption, or diseased cattle. And the argument of the majority of the court that state authority might be abused if sanctioned in the case of generally legitimate articles of trade (liquors) was negatived. Mr. Justice Harlan said, by the doctrine restated in Mugler *v.* Kansas: "If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and to give effect to the Constitution." [53]

Finally, the dissenting opinion argued, "If the Constitution of the United States does not, by its own force, displace or annul a state law, authorizing the construction of bridges or dams across public navigable waters of the United States, thereby

---

[51] See, in this connection, Rasmussen *v.* Idaho, 181 U. S. 198 (1901).

[52] For a recent illustration of the truth of this see Kirmyer *v.* Kansas, 236 U. S. 568 (1915).

[53] Mugler *v.* Kansas, 123 U. S. 623, 661.

wholly preventing the passage of vessels engaged in interstate commerce upon such waters, the same Constitution ought not to be held to annul or displace a law of one of the states which, by its operation, forbids the bringing within her limits, from other states, articles which that state, in the most solemn manner, has declared to be injurious to the health, morals, and safety of her people." The silence of Congress ought to have the same effect in each case, and "the reserved power of the States to guard the health, morals, and safety of their peoples is more vital to the existence of society, than their power in respect to trade and commerce having no possible connection with those subjects." [54]

The doctrines of this decision were carried one step further in Leisy *v.* Hardin, [55] and the holding here was such that Congress was forced to break its silence in order to permit the states to make effective their laws concerning the manufacture and sale of intoxicating liquors. In the Bowman case it had been decided that a state might not prohibit importation; in Leisy *v.* Hardin—which also came to the Supreme Court of the United States under an Iowa law—it was decided that the importer might sell the liquors in the "original package." The statute

[54] Bowman *v.* Chicago, etc., Ry. Co., 125 U. S. 465, 524. Prof. F. B. Clark in his recent monograph THE CONSTITUTIONAL DOCTRINES OF JUSTICE HARLAN (John Hopkins Studies in Historical and Political Science) inclines, as is perhaps natural, to the view that this dissent would have been better law than the majority opinion. Professor Clark is correct in his assertion that if the decision had been made according ing to Harlan's doctrine, there would have been no need for congressional legislation; but he is in error when he states that the Webb-Kenyon Act "puts into the hands of the states exactly the power that an affirmative decision in this case would have done." (p. 86) Nor is he correct in saying that the Webb-Kenyon Act "amounts to making it unlawful for any fermented liquor to be carried into any place where the people have voted it out. The violations of this act the states are left to punish as violations of their own laws. * * * The situation is now just about as it would have been had the Bowman case been decided according to Justice Harlan's doctrine. Spirituous liquors have been practically declared an article that a state, if it pleases to do so, may designate as unfit to be carried within its borders." (p. 89) On the contrary, the Webb-Kenyon Act by its title applies only to "certain cases;" and a contrary decision of the Bowman case would have empowered the state to exclude in all cases. See the papers cited in footnote 3.

[55] 135 U. S. 100 (1890).

of Iowa in question forbade manufacturing for sale, selling, keeping for sale, giving away, bartering, exchanging, or dispensing intoxicating liquor for any purpose except as provided in the Act, which authorized permits for one year for medical, chemical, pharmaceutical, and sacramental purposes only. The case was one of replevin, brought by the plaintiffs against Hardin, a marshall of Keokuk, Iowa, to recover a quantity of beer which had been made by the plaintiff in Illinois, transported to Iowa, and there offered for sale in the unbroken and original packages. The plaintiffs claimed the goods as owners and denied the validity of the state statutes. The Supreme Court of Iowa held the enactments valid and the judgment was reversed by the Supreme Court of the United States, Mr. Chief Justice Fuller delivering the opinion.

The power to regulate commerce among the states, he said, was a unit, and when particular subjects did not require a uniform rule, the states might legislate until Congress otherwise directed. But "where the subject-matter requires a uniform system as between the States, the power controlling it is vested exclusively in Congress and cannot be encroached upon by the States." It was recognized that to hold the state powerless to interfere until the imported packages became "part of the common mass of property within a State [so] as to be subject to its unimpeded control," while virtually ruled upon and answered in Brown *v.* Maryland, is contrary to the doctrine of Peirce *v.* New Hampshire.

The opinion continues: [56]

> "We are constrained to say that the distinction between subjects in respect of which there can be of necessity only one system or plan of regulation for the whole country, and subjects local in their nature, and, so far as relating to commerce, mere aids rather than regulations, does not appear to us to have been sufficiently recognized by him [Chief Justice Taney] in arriving at the conclusions announced. That distinction has been settled by repeated decisions of this court, and can no longer be regarded as open to re-examination. After all, it amounts to no more than drawing the

[56] *Ibid.*, p. 118.

line between the exercise of power over commerce with foreign nations and among the States and the exercise of power over purely local commerce and local concerns.

"The authority of *Peirce* v. *New Hampshire,* in so far as it rests on the view that the law of New Hampshire was valid because Congress had made no regulation on the subject, must be regarded as having been distinctly overthrown by the numerous cases hereinafter referred to." [57]

And the now firmly established doctrine is that stated in Bowman *v.* Chicago, etc., Ry Co.:

"The absence of any law of Congress on the subject is equivalent to its declaration that commerce in that manner shall be free. Thus the absence of regulations as to interstate commerce with reference to any particular subject is taken as a declaration that the importation of that article into the States shall be unrestricted. It is only after the importation is completed, and the property imported has mingled with and become a part of the general property of the State, that its regulations can act upon it, except so far as may be necessary to insure safety in the disposition of the import until thus mingled." [58]

The Iowa law was therefore declared unconstitutional; the state could not exercise such power without "congressional permission," [59] and to secure for the commonwealths authority to

[57] The opinion cites twenty-four cases. Those not already mentioned in this paper are the following: Case of the State Freight Tax, 15 Wall. 232 (1872); Henderson *v.* Mayor of New York, 92 U. S. 259 (1875); Cook *v.* Pennsylvania, 97 U. S. 566 (1878); Wabash, St. Louis, etc., Ry. Co. *v.* Illinois, 118 U. S. 557 (1886); Robbins *v.* Shelby Taxing District, 120 U. S. 489 (1887); Excanaba Co. *v.* Chicago, 107 U. S. 678 (1882); Transportation Co. *v.* Parkersburg, 107 U. S. 691 (1882); Morgan *v.* Louisiana, 118 U. S. 455 (1886); Smith *v.* Alabama, 124 U. S. 465 (1888); Nashville, etc., Ry. Co. *v.* Alabama, 128 U. S. 96 (1888); Kimmish *v.* Ball, 129 U. S. 217 (1889); Welton *v.* Missouri, 91 U. S. 275 (1875); Patterson *v.* Kentucky, 97 U. S. 501 (1878); Webber *v.* Virginia, 103 U. S. 344 (1880); Bartemeyer *v.* Iowa, 18 Wall. 129 (1873); Beer Co. *v.* Massachusetts, 97 U. S. 25 (1877); Foster *v.* Kansas, 112 U. S. 201 (1884); Kidd *v.* Pearson, 128 U. S. 1 (1888); Eilenbecker *v.* Plymouth County, 134 U. S. 31 (1890).

[58] Concurring opinion of Mr. Justice Field in the Bowman Case, p. 508.

[59] The dissent in the Leisy Case was on the same grounds as that in the Bowman Case (the opinion being written by Mr. Justice Gray and concurred in by Mr. Justice Harlan and Mr. Justice Brewer); but the

prevent the sale of intoxicating liquors in the original packages and, in fact, to restrict importation was the immediate necessity; for these decisions of the United States Supreme Court, marking a definite abandonment of the principles of The License Cases, seriously limited the efficacy of state regulations passed under the police power, and limited them in their operations to internal commerce. "Congressional permission" was therefore sought, and the result was the Wilson Act.

(To be Continued.)

Lindsay Rogers.

UNIVERSITY OF VIRGINIA.

---

concluding remark may be quoted: "The silence and inaction of Congress upon the subject, during the long period since the decision in The License Cases, appear to us to require the inference that Congress intended that the law should remain as thereby declared by this Court; rather than to warrant the presumption that Congress intended that commerce among the States should be free from the indirect effect of such an exercise of the police power for the public safety, as had been adjudged by that decision to be within the constitutional authority of the States." (p. 160.)